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No. 85-1251

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

STATE OF TEXAS,

Petitioner,

v.

DANNY E. HILL, 47TH DISTRICT ATTORNEY OF TEXAS, IN HIS OFFICIAL CAPACITY AS A DISTRICT ATTORNEY IN THE STATE OF TEXAS AND AS CLASS REPRESENTATIVE OF THE DEFENDANT CLASS OF ALL CITY, COUNTY AND DISTRICT ATTORNEYS IN THE STATE OF TEXAS, AND THE DEFENDANT CLASS,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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March 26, 1986

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QUESTIONS PRESENTED*

1. Whether the State of Texas has standing to petition this Court for a writ of certiorari and whether this Court has jurisdiction to entertain the State's Petition?

2. Whether merely questions of Texas state law are at issue, as opposed to matters of Federal-State regulations, and whether the Fifth Circuit correctly decided who can represent a state officer and the state in a federal court?

3. Whether the Fifth Circuit correctly determined that Hill was a proper appellant and could carry forward the appeal?

4. Whether the Fifth Circuit correctly determined that Texas law authorizes Hill to pursue the appeal and that the Attorney General has no authority to represent the defendant-class and its members?

5. Whether the Fifth Circuit decision allowing Hill to intervene was correct?

6. Whether the State has waived, and is estopped from asserting, any objection to Hill's standing and any argument that the State is the true party in interest?

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* In accordance with S.Ct. Rules 22.1 and 34.1(b), Hill certifies that all parties to the Fifth Circuit judgment sought to be reviewed are: Donald F. Baker, Appellee, and Danny E. Hill, 47th District Attorney of Texas, in his official capacity as a member of the Defendant-Class, and as the Class Representative of the Defendant-Class, and the Defendant-Class, all of whom will hereinafter be referred to simply as "Hill", Appellants below. The State of Texas informally sought leave to intervene or appear as an *amicus curiae* after previously withdrawing the State's appeal, but formal action was never taken by the Fifth Circuit on the State's request. The Texas Attorney General has assumed that the State was an intervenor before the Fifth Circuit. Neither the State of Texas nor the Texas Attorney General was a legitimate party before the Fifth Circuit Court of Appeals.

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OPINIONS BELOW

The opinions below are discussed in Hill's Cross-Petition for Writ of Certiorari against the State of Texas, No. 85-1412, at 1-2 and Hill's Cross-Petition for Writ of Certiorari against Donald F. Baker, No. 85-1512, at 1-2.[1]

[1] There are two Petitions for Writ of Certiorari pending before the Court with respect to the Fifth Circuit *en banc* decisions reported at 769 F.2d 289 and 774 F.2d 1285. Action No. 85-1251 was filed by the State of Texas against Danny E. Hill (hereinafter referred to as the "State's Petition"). A similar and companion Petition for Writ of Certiorari was filed by the Plaintiff, Donald F. Baker, against Henry Wade, et al. and is referenced as No. 85-1225 (hereinafter referred to as "Baker Petition"). Hill filed a Cross-Petition against the State of Texas, No. 85-1412, and a separate Cross-Petition against Donald F. Baker, No. 85-1512. References to Hill's Cross-Petitions shall refer to the Court's docket numbers for the respective Petitions.

For the convenience of the Court and parties, references to the "Baker App." refer to the appendix to Petition for Writ of Certiorari in No. 85-1225, and references to the "Hill App." refer to the appendix to Cross-Petition for Writ of Certiorari in No. 85-1412. The Petitioner in No. 85-1251, the State of Texas, shall hereinafter be referred to simply as the "State." The Plaintiff and Appellee below who is the Petitioner in No. 85-1225, Donald F. Baker, shall hereinafter be referred to simply as "Baker."

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit, sitting *en banc*, was entered on August 26, 1985. A Petition for Rehearing *En Banc* was denied on October 23, 1985. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1), but Hill denies that this Court has jurisdiction in two respects. First, as to Baker, he lacks standing to prosecute the present action (as explained fully in Hill's Brief in Opposition to Baker's Petition); consequently, this Court has no subject matter jurisdiction. Second, as to the State, it was at most an *amicus curiae* in the circuit court below, and an *amicus* cannot invoke jurisdiction of this Court under §1254(1) (as detailed fully below). Moreover, the State has refused to take a position on the constitutionality of the state statute challenged in this case; thus, there is no Article III case or controversy in this cause and so no jurisdiction in this Court over either the State's or Baker's Petition. Accordingly, both Petitions should be denied.

CONSTITUTIONAL PROVISIONS AND STATUTUES INVOLVED

A. Constitutional Provisions

Texas Constitution art. V, §21 is reproduced at Hill App. 11.

Texas Constitution art. XVI, §1 reads as follows:

> Members of the Legislature, and all other elected officials . . . shall take the following Oath or Affirmation: "I, , do solemnly swear (or affirm), that I will faithfully execute the duties of the office . . . and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State . . . ."

B. Statutes

28 U.S.C. §2403(b) is reproduced at Hill App. 10.

Texas Penal Code §§21.01 and 21.06 are reproduced at Hill App. 8 and 9 respectively.

STATEMENT OF THE CASE

A full and complete statement of the case is included in Hill's Cross-Petitions, No. 85-1412 at 3-10, and No. 85-1512 at 2-9. The State has made the following misstatements of the facts of the case.

1. The State misstates the parties comprising the defendant-class (State's Petition at 4). The defendant-class consists of all district, *county* and city attorneys in the State of Texas.

2. The Attorney General did nothing in the district court to defend the constitutionality of §21.06 other than filing a four-page response to the notice of suit. The Attorney General did not list any issues or contentions for the State in the pre-trial order (R. Vol. II at 339).

3. Hill was named as a defendant by being a member of the defendant-class and was, at the time the class was certified and is at the present time, a district attorney in the State of Texas.

4. The Attorney General was not a party to the appeal at the time the panel decision was rendered on September 21, 1984, nor at the time of the Fifth Circuit *en banc* decision on August 26, 1985. Both decisions of the Fifth Circuit were rendered after the Attorney General had withdrawn the appeal on behalf of the State. In the State's Petition, the Attorney General implies that the State was a party at the time of the Fifth Circuit opinions. The implication is incorrect.

The State's bare-bones statement of the case in its Petition omits important factual and procedural aspects of this case's history. Hill's Cross-Petitions clarify the omissions and misstatements by the State. It is important to note that in the State's Statement of the Case, the State admits that the Attorney General's involvement was only to represent "the state's interest." (State's Petition at 4, 5).

REASONS FOR DENYING THE WRIT

I.

THIS COURT HAS NO JURISDICTION TO ENTERTAIN THE PETITION FILED BY THE STATE OF TEXAS

Hill moves the Court, under Supreme Court Rule 22.3, to dismiss the State's Petition because the State was not a party in the court below or, in the alternative, to dismiss the State's Petition on jurisdictional grounds.

A. Only A Party Can Petition For Certiorari To This Court, And Neither The State Of Texas Nor The Texas Attorney General Was A Party Before The Fifth Circuit *En Banc*

The Court's jurisdictional grounds to hear appeals by writ of certiorari is premised upon 28 U.S.C. §1254(1) which provides:

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> > (1) By writs of certiorari granted upon the petition of *any party* to any civil or criminal case, before or after rendition of judgment or decree;

28 U.S.C. §1254(1) (emphasis added).

Only persons who are parties to the action below have a right to petition this Court for writ of certiorari. The State was not a party in the action below. The State initially filed a notice of appeal but thereafter withdrew the State's appeal by formal motion and letter (Hill App. 2 and 3). The State did not participate in the briefing and oral argument to the Fifth Circuit panel. After the Fifth Circuit granted rehearing *en banc,* the State sent a letter to the Fifth Circuit asking permission to participate in the *en banc* hearing. The State never filed a formal motion to intervene as a party. By order dated March 4, 1985, Chief Judge Charles Clark directed the State to file a brief outlining the procedural history of the case and the authority of the State to reintervene in the case once the State had dismissed

its appeal. The State's brief filed on or about March 29, 1985 did not directly address the intervention issue. No further orders were entered by the Fifth Circuit with respect to the right of the State to intervene in the case. Thus, the State was never granted permission to intervene as a party, and its participation in the *en banc* hearing was merely as an *amicus curiae,* if that. (Hill's Cross-Petition, No. 85-1412, at 10-20 contains additional arguments and authorities with respect to the non-party-status of the State under 28 U.S.C. §2403(b) regarding the appeal of this case and the State's participation in the *en banc* hearing. In the interests of brevity Hill directs the Court's attention to that Section of Hill's Cross-Petition against the State.)

Consequently, because the State withdrew its appeal as a party, its participation in the *en banc* hearing was merely as an *amicus curiae,* if at all. An *amicus curiae* is not a "party" for purposes of 28 U.S.C. 1254(1), and, thus, the State is not entitled to seek review in this Court by certiorari. *See In re Leaf Tobacco Board,* 222 U.S. 578, 581 (1911); *Ex parte Cutting,* 94 U.S. 14, 20-22 (1876); *International Union, United Auto., Aerospace & Agr. Implement Workers of America, AFL-CIO, Local 283 v. Scofield,* 382 U.S. 205 (1965). Indeed, Baker's Petition virtually admits this non-party and non-interested status of the Attorney General in this case when it requests the Court (apparently under the Court's Rule 36.4) to treat the Attorney General's Petition herein as an *amicus* brief because of the ambiguities "as to whether the Attorney General of Texas was a party in the court below." (Baker's Petition at 9 n.18).[2]

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[2] Significantly, Supreme Court Rule 36.4 itself draws a distinction between the appropriate legal representative for a State and "the authorized law officer" for a political subdivision of a State. The latter may file an *amicus* brief with the Supreme Court on behalf of his political subdivision of a State without obtaining the consent of any other person or party, including, apparently, the attorney general of that State. This Rule treats the attorney general of a State as the authorized legal representative of the State entity only. Hill contends, of course, that he is "the authorized law officer" for his political subdivision of Texas, Potter and Armstrong Counties, and that he may thus act independently of the Attorney General, a representative of the State.

B. No Article III Case Or Controversy Exists With Respect To The State Or The Attorney General Because The State Has Refused To Assert A Position On The Constitutionality Of Section 21.06.

The Attorney General has repeatedly disavowed, both explicitly and implicitly, any intention to address or support the constitutionality of §21.06 in this case.[3] Moreover, the State's brief to the Fifth Circuit *en banc,* at 11, specifically admits that the State sought intervention on appeal only "to defend his [the Attorney General's] exclusive right to represent the State's interests before this Court." The brief itself studiously avoided addressing the constitutionality of §21.06, even though the Fifth Circuit's March 4, 1985 order explicitly invited the Attorney General to brief that issue.[4]

In a similar case, this Court held that it had no jurisdiction and dismissed the suit for lack of any Article III case or controversy. *Princeton University and New Jersey v. Schmid,* 455 U.S. 100 (1982).[5] Precisely the same conclusion should be

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3. For example, in response to the Attorney General's February 20, 1985 letter to the Fifth Circuit requesting intervention at the *en banc* stage (Hill App. 5), Hill's counsel telephoned the Attorney General, who admitted that he sought to intervene only to address the issue of Hill carrying forward the appeal and that he would not address the constitutionality of §21.06. *See* February 25, 1985 letter of Hill's counsel to Fifth Circuit (Hill App. 7).

4. The State's Petition to this Court (No. 85-1251) also fails to address the issue of the constitutionality of §21.06.

5. In *Princeton,* an individual was convicted of criminal trespass upon Princeton University's property in New Jersey, and the defendant appealed through the New Jersey courts. At the New Jersey Supreme Court level, Princeton University intervened as a party, and after that court reversed the lower court's judgment, both the State of New Jersey and Princeton University filed a joint notice of appeal and jurisdictional statement to this Court. The New Jersey Supreme Court had found the state criminal trespass statute unconstitutional, but in the State's brief to the United States Supreme Court, the New Jersey Attorney General deemed "it neither necessary nor appropriate to express an opinion on the merits" of the constitutionality of the statute. 455 U.S. at 101. In a *per curiam* opinion expressing the unanimous view of the eight participating Justices, this Court found that since the state "declined to take a position on the merits," there could be no case or controversy and: "We do not sit to decide hypothetical issues or to give advisory opinions." 455 U.S. at 102. The Court thus dismissed the appeal, even though the other party appellant, Princeton University, wanted to continue the appeal.

reached in this action. This cause should be dismissed and the Petitions denied, even though Baker himself may still be interested in the case, because the Texas Attorney General has failed and refused to assert a position on §21.06's constitutionality.

II.

FEDERAL-STATE RELATIONS ARE NOT AT ISSUE, MERELY QUESTIONS OF TEXAS STATE LAW THAT WERE DECIDED CORRECTLY BY THE FIFTH CIRCUIT.

A. This Issue Involves Merely A Matter of Texas Law Regarding Who Can Represent A State Officer And The State Of Texas In A Federal Court.

The State argues that the question of whether Hill or the Attorney General may carry forward the appeal in this case is a highly significant issue requiring this Court's attention. To the contrary, this issue involves merely a matter of Texas state law regarding which state officers may represent themselves in a federal forum. While Hill agrees that the Fifth Circuit determined this issue correctly in his favor, Hill suggests that this purely state-law issue is not a proper subject for Supreme Court review.

This Court has frequently held that a petitioner's challenge to state-law determinations made by a United States circuit court will rarely constitute an appropriate subject of Supreme Court review.[6] Recently, this Court announced that: "The allocation of authority among state officers to represent the state before this Court is . . . wholly a matter of state concern." *New York v. Uplinger*, 467 U.S. 245 n.1, 104 S.Ct. 2332, 2333 n.1 (1984). This Court has also expressly declared that among the grounds for the Court to deny certiorari is the fact that the decision below may be supportable as a matter of state law.

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[6] *Haring v. Prosise*, 462 U.S. 306, 103 S. Ct. 2368, 2373 n.8 (1983). *See also Bishop v. Wood*, 426 U.S. 341, 346 (1976) (Court normally accepts any reasonable construction of state law by the Court of Appeals, even if a separate examination of state law might justify a different conclusion).

Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950). Texas law supports Hill's standing in the instant cause to carry forward his appeal, and the State's challenge to this state law determination by the Fifth Circuit should not constitute an appropriate topic for this Court's consideration.

B. Principles of Comity And Federalism Support The Decision Of The Fifth Circuit.

The true principles underlying federal-state comity require that this Court allow the Texas Legislature, not the histrionics of a single state official (the Attorney General) nor the idiosyncrasies of a single federal trial judge, to determine the validity and continued vitality of §21.06. The Texas Legislature has consistently refused to repeal §21.06 at the behest of homosexual activists in that State, thus indicating that the will of the people of Texas is to maintain §21.06 as a viable state statute. Indeed, as Judge Reavley has cautioned: "Moral issues should be resolved by the people, and the laws pertaining thereto should be written or rescinded by the representatives of the people." 774 F.2d at 1287. This Court should not disturb the announced will of the people of Texas represented by §21.06.

III.

THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT HILL WAS A PROPER APPELLANT AND COULD CARRY FORWARD THE APPEAL.

A. Neither Hill Nor The Original Class Representatives Represent The State. Hill Is A Defendant And The Class Representative On Appeal.

Throughout the State's Petition, the State asserts that Hill purports to represent the interests of the State. Hill has previously denied, and continues to deny, that Hill represents, or is attempting to represent, the interests of the State. The essential fallacy in the State's Petition and argument is the Attorney General's persistent, erroneous assumption that Hill purports to represent the interests of the State. He does not.

Hill represents his own interests in his official capacity as a member of the defendant-class and as the class representative of the defendant-class. Hill now stands in the shoes of the original class representatives.

Neither the original class representatives nor Hill have ever attempted to represent the State. If the original class representatives were present before this Court, could the State seriously argue that they do not have standing to appeal the adverse judgment against the defendant-class? Hill has been properly substituted as the class representative and that order of substitution has not been attacked by the State or Baker. The State continually misleads the Court by misstating the interests of Hill.

The State was a totally separate and distinct party from Hill and other members of the defendant class. The actions of the State (as the Attorney General himself represented to the Supreme Court of Texas in related mandamus proceedings) in withdrawing its appeal did not affect the rights of Hill to continue with the appeal as a member of the defendant-class and as the class representative. In noting this simple, straightforward distinction, the Court can see through the confusion the State's Petition seeks to create.

B. The Attorney General Never Purported to Represent The Interest of Hill or The Defendant-Class.

The Attorney General has never purported to act on behalf of the defendant class and its members. In fact, in his letter to the Court notifying the Court that he was withdrawing the State's Notice of Appeal, the Attorney General stated:

> We are aware that a notice of appeal has been filed by Mr. Hill, the District Attorney of Potter County and we have advised him of our determination not to further prosecute the appeal. *I assume you will be hearing directly from his office as to his intentions with respect to a continuation of the appeal on behalf of his office.*

(Hill App. 2) (emphasis added). Further, prior to the trial court's Memorandum Opinion of August 17, 1982, the attorney general filed only one pleading: a four-page "Response of the State of Texas" filed on July 9, 1980. (R. Vol. 1 at 79-82). The

Response was filed on behalf of the State, not Hill or the defendant-class.

After the trial court's ruling on attorney's fees, the Attorney General filed only two additional pleadings: a Notice of Appeal (R. Vol. IV at 874) and a Motion to Withdraw Appeal (Hill App. 3). Again, these pleadings were filed on behalf of the State, not Hill. None of the pleadings filed by the Attorney General indicate that the Attorney General was representing Hill. Additionally, in the certificate of service to the State's Motion to Withdraw Appeal, the Attorney General certified service of the Motion to Jim Barber, Appellee's counsel, and "Danny Hill." Obviously, based upon these facts, the Attorney General intended to represent only the State and considered Hill a proper and distinct party-Appellant. The State now takes a contrary position.

The State's position before this Court is diametrically opposed to the statements made by the Attorney General to the Supreme Court of Texas. In response to a mandamus action by Hill and others against the Attorney General to compel him to continue the appeal of this case, the Attorney General, on behalf of the State, told the Supreme Court of Texas that "Petitioner Hill has already filed a timely notice of appeal in the Fifth Circuit of the very decision they seek to have appealed."[7] Hence, the Attorney General took the position before the Supreme Court of Texas that Hill was a proper appellant before the Fifth Circuit and that he could continue the appeal. Now, in a different forum, the Attorney General takes a totally inconsistent position with respect to Hill's right to appeal. Which position does the Attorney General wish the Court to believe? The State should not be allowed to change its position with respect to Hill's standing after Hill prevailed in the Fifth Circuit. The Attorney General's admissions to the Texas Supreme Court are but one example of the State's inconsistency with respect to Hill's status as a party.

The Attorney General misleads the Court by implying that the Attorney General and the State were actively involved in the defense of §21.06 at the trial court level. In fact, with the exception of the filing of a four-page "Response," the Attorney

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7. *Baker v. Wade*, 769 F.2d 289, 291 (5th Cir. 1985) (*en banc*).

General did absolutely nothing to defend the constitutionality of §21.06. The defense of the statute was conducted entirely by the class representatives, Henry Wade, District Attorney for Dallas County, Texas, and Lee Holt, City Attorney for the City of Dallas. The Attorney General did not participate in the filing of any pre-trial motions; did not conduct any discovery; did not offer any trial testimony; did not actively, if at all, participate in the trial; and, did not participate in trial strategy for the defendant-class. Indeed, the Attorney General did not even take any position in, or execute, the pretrial order, even though representatives of all other parties did.

Instead of concentrating his activities on the defense of §21.06, the Attorney General, after withdrawing the State's appeal of the trial court's judgment, has expended considerable time and effort to interfere with and, apparently, hopefully prohibit Hill from pursuing the appeal. The coordinated effort of the Attorney General and Baker to deny Hill the right to appeal is underscored by the Attorney General's reliance upon Baker's appendix to Baker's Petition and the concerted effort of both the State and Baker to attack Hill's right to appeal. It is interesting that the Attorney General would so vigorously seek to deny Hill the right to appeal but fail to vigorously defend the constitutionality of a state statute. It appears that the Attorney General has some vested interest in repealing §21.06 without legislative involvement. Surely the Attorney General will admit that the State's Petition and arguments, if successful, will assist Baker in overturning §21.06; a statute the Attorney General swore to uphold.[8] Neither the State nor the Attorney General are a proper party to defend §21.06. Hill is the proper party. The Attorney General is working against the true interest of defending §21.06.

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[8] Tex. Const. art. XVI, §1.

IV.

THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT TEXAS LAW AUTHORIZES HILL TO PURSUE THE APPEAL AND THAT THE ATTORNEY GENERAL HAS NO AUTHORITY TO REPRESENT THE DEFENDANT-CLASS AND ITS MEMBERS IN THIS ACTION.

The authorities cited by the State in its Petition are all inapposite to the question of who may appeal an adverse judgment against the defendant-class. The authorities cited by the State merely stand for the general proposition that the Attorney General represents the interests of the State in limited circumstances. Hill does not purport to stand in the shoes of the Attorney General to represent the interests of the State. Consequently, the State's authorities and arguments with respect to this issue are irrelevant. The true question is: Who is the proper representative of the defendant-class on appeal? It certainly is not the Attorney General of Texas, nor the State, neither of whom ever purported to represent the defendant-class. The proper representative of the defendant-class is the class representative or a class member that has been adversely affected by the Court's judgment—class member/representative Hill.

The Fifth Circuit correctly disregarded the irrelevant assertions of the State concerning its role in the appeal. The Attorney General abandoned any interest he may have in this appeal by filing his Motion to Dismiss. Nevertheless, assuming *arguendo* that the State has some interests left in this appeal, Texas law does not grant the Attorney General the exclusive right to represent the State in all circumstances.

A. The Texas Constitution

Article IV, Section 22 of the Texas Constitution, in applicable part states: "[The attorney general] shall represent *the State* in all suits and pleas in *the Supreme Court of the State* in which the State may be a party, ..." (emphasis added). TEX. CONST. art. IV, §22. This provision of the Constitution, by its own words, only gives the Attorney General the authority to represent *the State* in suits before *the Supreme Court of the*

State of Texas. Because the State of Texas withdrew its appeal and did not properly reintervene on appeal, the State is no longer a party. For that reason alone, Art. IV, Section 22 is inapplicable. Further, it is obvious that this is not an action before the Supreme Court of Texas; thus, the Texas Constitution and the State's references to it are invalid.

B. Article 4395

The State's reliance on Article 4395 of the Texas Revised Civil Statutes is misplaced. That statute states: "The Attorney General shall prosecute and defend all actions *in the Supreme Court* or the *Courts of Civil Appeals* in which the State may be interested." Tex. Rev. Civ. Stat. Ann. art. 4395 (Vernon 1976) (emphasis added). Again, the Attorney General's authority to "defend" is limited only to those actions in which the State is involved. Further, the Attorney General's power only extends to two courts: the Supreme Court [of Texas] and the "Courts of Civil Appeals." The phrase: "Courts of Civil Appeals," refers to the Texas intermediate Courts of Appeals as defined by Article 5, Section 6 of the Texas Constitution. TEX. CONST. art. V, §6. Article 4395 does not give the Attorney General the authority to represent the State in actions before federal courts.

None of the statutes cited by the State confirm that (i) the State is the exclusive real party in interest or, more importantly, (ii) that the Attorney General is the proper representative of the interests of the defendant-class. Texas decisions confirm the limited authority of the Attorney General.

In *Charles Scribner's Sons v. Marrs*, 262 S.W. 722 (Tex. 1924), the Texas Supreme Court merely interpreted whether Article 2909n of the text book statute of Texas gave exclusive authorization to the Attorney General to determine pursuant to that statute whether to bring suits on behalf of the State to test the validity of contracts executed under this law. The Court found that the Attorney General was *authorized by that statute* to exercise judgment and discretion in determining whether to bring any such action. Neither the holding in *Charles Scribner's Sons* nor Article 2909n authorizes the Attorney General to speak for, or defend, the district, county, and city attorneys of Texas in a federal court action to restrain the exercise of their lawful and responsible duties.

The Attorney General's reliance upon *Bullock v. Texas Skating Assn*, 583 S.W. 2d 888 (Tex. Civ. App.—Austin 1979,

writ ref'd n.r.e.), (cited at 14 of State's Petition) is equally misplaced. *Bullock* was a taxation case; it did not involve a class action or an injunction against district, county, and city attorneys. The question before the court was whether or not the comptroller, in the exercise of his *administrative duties*, had the authority to bring litigation to a halt. The court found that the comptroller did not because his *statutory powers* had ended. *Bullock* is distinguishable for several additional reasons. First, the plaintiff initiated the suit under Article 1.05, Title 122A, Taxation-General which provides, in relevant part:

> Such suit shall be brought against the public official charged with the duty of collecting such tax or fees, the State Treasurer *and the Attorney General.*

TEX. TAX-GEN. ANN. art. 1.05 (1960). The express language of the statute makes the attorney general a party. Second, it was a case before a Texas Court of Civil Appeals. (Article 4395). Third, the plaintiff was not seeking an injunction against any state officer's performance of his official duties. Lastly, the Attorney General has the statutory responsibility to advise all State Department heads such as the Comptroller, TEX. REV. CIV. STAT. ANN. art. 4399 (1977), and to defend the Comptroller in suits brought against him, his office or the State. TEX. REV. CIV. STAT. ANN. art. 6252-26 (1975). Thus, the Attorney General's representation of the Comptroller in *Bullock* is nothing more than what he is required to do by specific statute.

Brady v. Brooks, 99 Tex. 366, 89 S.W. 1052 (1905), is likewise misinterpreted by the Attorney General. The Attorney General cites *Brady* for the general proposition that he is entrusted with "broad judgment and discretion." (State's Petition at 13). In *Brady* a dispute arose between the rights of the county attorney of Travis County and the District Attorney to prosecute suits brought by the attorney general to recover taxes and penalties under the "Kennedy Bill" and the "Love Tax Bill" passed by the Texas legislature. Both of these statutes authorized the Attorney General to bring suit in the name of the State to collect taxes, penalties and forfeitures.

The question before the Texas Supreme Court in *Brady* was whether the provisions in the Kennedy Bill and the Love

Tax Bill providing for suit to be prosecuted by the Attorney General were constitutional in light of Article 5, Section 21 of the Texas Constitution which gives the County and District Attorneys the authority to represent the State in their respective counties. The Court determined that Article 5, Section 21 of the Constitution did not prohibit the State legislature from specifically authorizing the prosecution of a suit by the attorney general.

In reaching its decision, the Texas Supreme Court stated: "It is *by virtue of the authority granted by these statutes* (the Kennedy Bill and the Love Tax Bill) that the Attorney General has assumed to act in these cases" 89 S.W. 1053 (emphasis added). The reasoning and findings of the court do not support the State's expansive view of the rights of the Attorney General. It was only by virtue of the specific legislation passed by the Texas Legislature that the Attorney General had the authority to act at all.

The Attorney General's authority to act as the legal representative for the State and for State Department heads, employees or officers is limited by the Texas constitution and numerous Texas statutes. For instance, the Attorney General is responsible for defending state district judges in any action or suit in federal courts in which the judge is a defendant because of his office as district judge if the district judge requests the Attorney General's assistance. TEX. REV. CIV. STAT. ANN. art. 4412b (1975). It is interesting to note that this statute does not give the Attorney General the responsibility to defend *county* judges and it is expressly limited to "any action or suit in the federal courts." Arguably, in any action or suit in state court, this statute would not give the Attorney General the authority to represent a state district judge.

The Attorney General's authority is further limited by decisions of the Texas Supreme Court. In *Garcia v. Laughlin,* 285 S.W.2d 191 (Tex. 1955), the Texas Supreme Court held that the Attorney General does not possess the power to institute proceedings for removal of a county commissioner. 285 S.W.2d at 195. In reaching its decision, the Court stated "[i]n the absence of a *specific legislative enactment* we believe that the Constitution provides for either the district attorney or the county attorney, jointly or singly, in the event either fails to act, to be the proper officer to represent the State in the district

court." 285 S.W.2d at 195. The *Garcia* Court also acknowledged that the authority of the Attorney General in *Brady* "to prosecute the suits was sustained under a *legislative act* . . . ." 285 S.W.2d at 196 (emphasis added). Thus, in the absence of specific legislation, the Attorney General does not have the authority to represent the district, county and city attorneys in federal court actions brought against them to restrain their enforcement of a state statute. If the State legislature wishes to grant the Attorney General that authority, it may do so; but, it has not done so.

Despite devoting thousands of words to their argument, neither the Attorney General nor Baker have cited any authority which holds that the Attorney General is the exclusive officer to act for all district, county and city attorneys in a federal suit against them challenging the constitutionality of a state statute.[9]

C. Under Texas Law, The Attorney General May Issue Formal Legal Opinions, But Such Opinions Do Not Bind Other State Agencies, Officers, Or Courts, Who May Assert In Court Positions Contrary To The Attorney General.

In addition to the authorities cited above, analogous State law demonstrates that the Attorney General is not all powerful and cannot bind other State agencies, officers, or courts with his opinions.

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9. Typical of the Attorney General's arguments is the one constructed upon the comments of a Texas House Committee upon the non-passage of legislation sponsored by State Representative Bill Ceverha which, if passed, would have limited the Attorney General's actions to compromise certain litigation in federal court (including that involving the constitutionality of a state law) "unless the state agency represented by the Attorney General consented to the settlement or judgment." The House Committee on State Affairs commented that Texas law granted such authority to the Attorney General by direct inference. First, this entire analysis is irrelevant to whether a defendant class of city, county and district attorneys may defend themselves in federal court (since they were clearly not state agencies). Further, the elevation to the level of statutory law of a comment by a legislative committee to the effect that direct inferences from unidentified sources grant authority to the Attorney General to take certain action is without merit.

Article IV, §22 of the Texas Constitution provides that the Attorney General may render advisory opinions to the Governor and other executive officers, but no part of the Texas Constitution provides that these Attorney General opinions are binding on these officers or on a court of law. In fact, the Texas Supreme Court has specifically held that such Attorney General opinions are merely advisory in nature and do *not* bind the State officers or agencies dealt with in such opinions; furthermore, these State officers and agencies are free to assert their own, contrary legal positions in litigation in the courts. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

Accordingly, if the Attorney General's formal, constitutionally-authorized opinions are not binding on other State officers who may assert their own, contrary legal positions, even in litigation, it cannot possibly be said that the Attorney General's informal, non-constitutionally-authorized decision not to continue the appeal below is binding on Hill and the other district, county and city attorneys of Texas as true defendants in this case.

V.

THE FIFTH CIRCUIT DECISION ALLOWING HILL TO INTERVENE WAS CORRECT.

A. Hill's Intervention.

Separate and apart from Hill's standing as a party/class member and the class representative in the circuit court proceedings, he was a proper intervenor. The *en banc* court correctly opined that "the order granting intervention was justified because Hill's position satisfied the requirements of both Fed. R. Civ. P. 23(d)(2) and 24(a)(2)." *Baker v. Wade*, 769 F2d 289, 291-92 (5th Cir. 1985) (*en banc*). The *en banc* court correctly concluded that "[a]s a state official empowered by Texas law to enforce criminal laws, his [Hill's] interest and its impairment by the district court's judgment cannot be questioned." 769 F.2d at 292. With respect to the issues of timeliness and adequacy of representation, the *en banc* court

followed the established rule that "even where the interest of a person may have been adequately represented at trial, failure to take an appeal from an adverse judgment may introduce the element of inadequacy, entitling the interested person to intervene *after judgment* to file an appeal." *Nuesse v. Camp*, 385 F.2d 694, 704 n.10 (D.C. Cir. 1967) (emphasis added).

The present case is squarely on point with this Court's decision in *Bryant v. Yellen*, 447 U.S. 352 (1980). In *Bryant*, this Court "agree[d] with the Court of Appeals that the respondents who sought to enter the suit when the United States forewent an appeal from the District Court's adverse decision had standing to intervene and press the appeal on their own behalf." 447 U.S. at 366. Likewise, Hill, who sought to intervene in the suit when the Attorney General withdrew the State's appeal, has standing to intervene and press the appeal because he has a sufficient stake in the outcome of the controversy to afford him standing. 477 U.S. at 368.

The correctness of the *en banc* court's decision upholding the order allowing Hill's intervention is confirmed by the fact that, on several occasions, this Court "has allowed a non-party below, whose rights were vitally affected by the lower court's decision, to intervene, by motion in the Supreme Court, in order to file his own petition for certiorari where his interests, which were defended by the losing party below, had been abandoned by the losing party's failure to apply for certiorari." A. STERN, E. GRESSMAN, & S. SHAPIRO, SUPREME COURT PRACTICE §6.16 at 340 (6th ed. 1986). *See Banks v. Chicago Grain Trimmers*, 389 U.S. 813 (1967), 390 U.S. 459 (1968); *Hunter v. Ohio ex rel. Miller*, 396 U.S. 879 (1969). *Accord McKenna v. Pan American Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962) (recognizing that a court of appeals may in appropriate circumstances "permit intervention where none was sought in the district court"). Furthermore, this Court where necessary has even "allowed certain persons to participate in the proceedings in order to protect their interests, regardless of whether they were parties or intervenors below." A. STERN, E. GRESSMAN, & S. SHAPIRO, SUPREME COURT PRACTICE §6.16 at 340 (6th ed. 1986).

See United States v. Terminal Railroad Ass'n, 236 U.S. 194, 199 (1915) (this Court allowed certain parties, who had been

denied intervention below, to intervene in pending appeals before the Court to protect their interests).

In any event, Hill did not need formally to intervene or be appointed class representative on appeal because, as a party defendant and member of the defendant-class, Hill already had the right to appeal, especially when the class representatives in the trial court failed to appeal and when the class was not given notice of a settlement adverse to it. These arguments have been fully briefed in Hill's Cross-Petition against the State, No. 85-1412, at 24-27, and the Court is respectfully referred to that section for brevity's sake herein.

B. If Hill Can Be A True Party For 42 U.S.C. §1988 Purposes, Hill Is A True Party Defendant As Well.

Contrary to the State's present protestations regarding potential attorneys fees being awarded against the State in this cause, Baker's counsel, James Barber, in answer to a specific question from the *en banc* panel at the Fifth Circuit oral argument, admitted and affirmed that he and his client would seek their attorneys fees in this case against Hill and his jurisdiction, Potter and Armstrong Counties, not against the State.[10] Furthermore, the district judge in this case has already indicated in no uncertain terms that if Hill does not prevail in this appeal, the district court will award Baker's attorneys fees against Hill and Potter County, not against the State. *Baker v. Wade,* 106 F.R.D. 526 (N.D. Tex. 1985) (Baker App. at 112a n.33). Thus, if Hill can be the true "non-prevailing party" for §1988 attorney's fees purposes by Baker's and his counsel's own admission and by statements of the trial judge, then Hill should certainly be a true party defendant and appellant for purposes of this appeal.

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[10] Mr. Barber also admitted, in response to a direct question from Judge Jones at *en banc* oral argument, that he and his client had entered into a settlement with the Attorney General to reduce their earlier fee award from the district court in return for the State dropping its then-pending appeal to the Fifth Circuit. Thus, Baker's allegation at page 14 of the Baker Petition that Texas has already been assessed more than $80,000 in costs and fees is no longer correct; the settled fee is less and cannot increase.

VI.

THE STATE HAS WAIVED AND IS ESTOPPED FROM ASSERTING ANY OBJECTION TO HILL'S STANDING AND ITS ARGUMENT THAT THE STATE IS THE TRUE PARTY IN INTEREST

The State's claim that the State is "the real party in interest in this case" confuses the concepts of "real party in interest" and "capacity to be sued." In addition, the State has waived any right to make this claim and so challenge the capacity of Hill as a true defendant under Federal Rules of Civil Procedure 9 and 17. The authorities on this issue have been explained fully in Section I.E of the argument in Hill's Cross-Petition against the State (No. 85-1412), and for brevity's sake, the Court is respectfully referred to that section. The State has waived and is now estopped to raise any such challenge against Hill.

CONCLUSION

The case at bar, with its unusual defendant class of all state district, county, and city attorneys, with the State Attorney General dropping an appeal and later attempting to reintervene in the same appeal, and in which a class member filed his own timely notice of appeal when the original named class representatives failed to timely appeal, is so procedurally unique that, in all probability, such a case will never recur. As discussed above, Baker's counsel admitted at *en banc* oral argument that he would never structure a case in this fashion again, and new militant homosexual challenges to state sodomy statutes (such as that of Louisiana) have declined to adopt this defendant-class tactic. Therefore, since the relevant facts related to the Attorney General's petition are unlikely to recur and involves solely the unique claims of the instant parties, this cause does not provide an appropriate vehicle for the Supreme Court to exercise its discretionary certiorari jurisdiction.

Finally, it seems inappropriate for the Court to involve itself in a contest between two State officials regarding matters of Texas state law and authority. A similar rationale was employed by this Court to dismiss certiorari in *New York v. Uplinger*, and the Court should consider this aspect carefully in acting upon the instant Petition.

For all of the above reasons, the State's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the above and foregoing have been mailed, by Certified Mail, Return Receipt Requested, to all attorneys of record on this 26th day of March, 1986.

/s/ WM. CHARLES BUNDREN

Wm. Charles Bundren